162 *Order Directing Transfer of Insurance.*

At a Term of the United States District Court for the Northern District of New York, held in the United States Court Room in the City of Utica, on the 6th day of September, 1904.

Present—Hon. George W. Ray, United States District Judge.

In the District Court of the United States for the Northern District of New York.

In the Matter of JACOB M. MERTENS, CHARLES R. MERTENS, ERNEST T. MERTENS, and EDMUND A. MERTENS, Individually and as Composing the Co-partnership Firm of "J. M. Mertens & Co.," Bankrupts.

Albert K. Hiscock, the trustee in bankruptcy of the bankrupts above named, having heretofore filed his petition verified January 26, 1904, praying that an order might be made by this Court, requiring Jacob M. Mertens to deliver and transfer to this pe-
163 titioner, by good and sufficient assignments, the life insurance policies hereinafter mentioned, which policies were claimed in said petition to be vested in said petitioner, and said petition with a notice of motion returnable before this Court on January 28, 1904, and with an admission of due and personal service thereof upon said Jacob M. Mertens having been presented to this Court on said 28th day of January, 1904, and said bankrupt, Jacob M. Mertens, having then and there appeared and filed his answer by Wilson, Cobb & Ryan, of Syracuse, N. Y., his attorneys, thereby denying the right of said trustee to the relief asked for by him in said petition and an order having been then and there made by this Court, referring said matter to Charles L. Stone, of Syracuse, N. Y., as Special Master, to hear the evidence and take the proofs of the parties relating to the facts and matters set forth in said petition and answer and to report the same with his findings of fact and conclusions of law, and the said parties having appeared before said Special Master and submitted their proofs and the said Referee having made his report, dated June 7, 1904, and the same having been filed, whereby it was found by said Referee that the said policies passed to and became the property of the said trustee in bankruptcy, and said bankrupt by his attorneys having thereafter filed his exceptions to said findings and report of said Referee, and a motion for the confirmation of said report having thereafter been made at a term of this Court, held at the United States Court Room in the City of Binghamton, Broome County, New York, on June 14, 1904, and having been thereupon adjourned, and the said parties having appeared before this Court, said Albert K. Hiscock aforesaid appearing by Lewis & Crowley, his attorneys, and the said bankrupt, Jacob M. Mertens, appearing by
164 Wilson, Cobb & Ryan, his attorneys, and said exceptions having been argued and said report and the questions raised

thereby having been submitted to this Court and due deliberation having been had, now, on motion of Lewis & Crowley, attorneys for Albert K. Hiscock, as trustee in bankruptcy of the estates of said bankrupts, and after hearing Wilson, Cobb & Ryan, attorneys for said bankrupt, Jacob M. Mertens, in opposition thereto, it is

Ordered and adjudged, that the report of said Special Master, Charles L. Stone, herein dated June 7, 1904, be and the same is hereby in all respects confirmed, and the said exceptions filed by the said bankrupt to said report be and the same are each and all overruled. It is further

Ordered and adjudged, that the policies of insurance set forth in said petition, to wit, policy No. 274445 for $20,000, issued by the Equitable Life Assurance Society of the United States upon the life of Jacob M. Mertens and dated March 8, 1884, and policy No. 415668, for $20,000, issued by the Equitable Life Assurance Society of the United States upon the life of Jacob M. Mertens, and dated January 23, 1889, and policy No. 417171 for $50,000, issued by the Equitable Life Assurance Society of the United States upon the life of Jacob M. Mertens and dated February 15, 1889, and all the rights, title and interest of Jacob M. Mertens in and to each of said policies, and the rights, powers and property represented thereby have passed to and are the property of Albert K. Hiscock, as trustee in bankruptcy of the estate of Jacob M. Mertens and now are and remain in him. And it is further

Ordered and adjudged, that the said Jacob M. Mertens upon demand execute and deliver any and all assignments, releases and other papers necessary to constitute proper vouchers in pro-
165 tection of said Life Assurance Society in treating the said trustee as the owner of said policies, respectively, and execute and deliver upon demand to said trustee all assignments and releases which may be required by said trustee or said Life Assurance Society, or which may be advisable in order to permit of the sale of said policies by said trustee, or the exercise of the options provided in said policies by said trustee or the collection of any moneys due or to become due from said Life Assurance Society upon the said policies or either of them.

Witness the Hon. George W. Ray, Judge of said Court, and the seal thereof, at the city of Utica, on the 6th day of September, 1904.

Enter.

GEO. W. RAY,
U. S. Judge.

166 In the District Court of the United States for the Northern District of New York.

In the Matter of JACOB M. MERTENS, CHARLES R. MERTENS, ERNEST T. MERTENS, and EDMUND A. MERTENS, Individually and as Composing the Co-partnership Firm of "J. M. Mertens & Co.," Bankrupts.

Due and timely service of notice of an application for the annexed order to be made to the United States District Court for the

Northern District of New York on September 6, 1904, is hereby admitted.

Dated September 5, 1904.

WILSON, COBB & RYAN,
Att'ys for Bankrupts.

(Endorsed:) Order directing transfer of insurance.—Filed Sep. 8, 1904.—W. S. Doolittle, Clerk.

167 In the United States District Court for the Northern District of New York.

In the Matter of JACOB M. MERTENS, CHARLES R. MERTENS, ERNEST T. MERTENS, and EDMUND A. MERTENS, Individually and as Composing the Co-partnership Firm of "J. M. Mertens & Co.," Bankrupts.

Jacob M. Mertens, one of the bankrupts above named, feeling aggrieved by the order and decree in the above entitled proceeding, bearing date the 6th day of September, 1904, and filed and entered in the office of the Clerk of this Court on the 8th day of September, 1904, and which said order confirmed the report of Hon. Charles L. Stone, Special Master herein, hereby appeals from said order and decree to the United States Circuit Court of Appeals for the Second Circuit and petitions this Court for an order allowing said Jacob M. Mertens, Bankrupt, to appeal from said decree to the United States Circuit Court of Appeals for the Second Circuit, and prays that the amount of the bond on appeal be fixed at Two Hundred and Fifty ($250.00) Dollars, and a transcript of the record herein be
168 transmitted to said Circuit Court of Appeals.

Dated December 14, 1904.

WILSON, COBB & RYAN,
Complainant's Solicitors.

On the foregoing petition and the assignment of errors,

Ordered, that the said petition be and the same is hereby granted and the appeal of said Jacob M. Mertens to the United States Circuit Court of Appeals for the Second Circuit from the final order and decree entered and filed in the above entitled cause on the 8th day of September, 1904, be and it is hereby allowed, and such allowance is hereby made as of November 14, 1904, and further

Ordered, that the amount of the bond on said appeal be, and the same hereby is, fixed at the sum of Two Hundred and Fifty ($250.00) Dollars, and leave is hereby given Complainant to elect to file a bond of Two Hundred and Fifty ($250.00) Dollars, or deposit said sum with the Registry of this Court, subject to the order of the Court, and further

Ordered, that a certified transcript of the record and proceedings herein be transmitted to said United States Circuit Court of Appeals,

except such parts as Complainant and defendant may stipulate in respect to .

Dated December 14th, 1904.

GEO. W. RAY,
United States District Judge.

(Endorsed:)—Petition and Order.—Filed Dec. 16, 1904.—W. S. Doolittle, Clerk.

169 *Notice of Appeal.*

In the District Court of the United States for the Northern District of New York.

In the Matter of JACOB M. MERTENS, CHARLES R. MERTENS, ERNEST T. MERTENS, and EDMUND A. MERTENS, Individually and as Composing the Co-partnership Firm of "J. M. Mertens & Co.," Bankrupts.

To Albert K. Hiscock, Trustee in Bankruptcy of the Estates of the above named Bankrupts, and Lewis & Crowley, Solicitors for the said Trustee:

You are Hereby Notified that the above named Jacob M. Mertens, hereby appeals from the order and decree in the above entitled proceeding, bearing date the 6th day of September, 1904, and entered and filed in the office of the Clerk of this Court on the 8th day of September, 1904, and which said order confirmed the report
170 of Hon. Charles L. Stone, Special Master herein, to the United States Circuit Court of Appeals for the Second Circuit.

Dated December 16th, 1904.

WILSON, COBB & RYAN,
Solicitors for Jacob M. Mertens, Appellant.

Office and Post Office Address, 15 Third National Bank Building, Syracuse, N. Y.

(Endorsed:)—Notice of Appeal.—Filed Dec. 19, 1904.—W. S. Doolittle, Clerk.

In the District Court of the United States for the Northern District of New York.

In the Matter of JACOB M. MERTENS, CHARLES R. MERTENS, ERNEST T. MERTENS, and EDMUND A. MERTENS, Individually and as Composing the Co-partnership Firm of "J. M. Mertens & Co.," Bankrupts.

Whereas, lately at a term of the District Court of the United States for the Northern District of New York, in a proceeding instituted by the petition of Albert K. Hiscock, Trustee in Bank-
171 ruptcy of the estate of the above named Jacob M. Mertens, Charles R. Mertens, Ernest T. Mertens and Edmund A. Mer-

tens, praying for an order requiring the above named Jacob M. Mertens, Bankrupt, to assign, transfer and set over to him certain policies of life insurance therein described, an order and decree was made granting the prayer of said petition and confirming the report of Hon. Charles L. Stone, Special Master herein, and said Jacob M. Mertens having obtained from said Court an order allowing an appeal to the United States Circuit Court of Appeals for the Second Circuit from said order and decree, and a citation to said Albert K. Hiscock, as trustee aforesaid, having been granted, admonishing him to appear before said Court of Appeals, now, therefore,

The Bankers Surety Co., having an office and usual place of business at Cleveland, Ohio, does hereby pursuant to the Statute in such case made and provided, undertake that the Appellant, Jacob M. Mertens, shall prosecute his appeal to effect, and if he shall fail to make good his plea, shall answer for all costs awarded against him upon said appeal, not exceeding the sum of Two Hundred and Fifty ($250.00) Dollars.

Dated Syracuse, N. Y., December 14th, 1904.

THE BANKERS' SURETY CO.,
CLARENCE W. DARLING,
Third Vice-President.
WILLIS H. MICHEL,
Assistant Secretary.

[SEAL.]

172 STATE OF NEW YORK,
County of Onondaga, City of Syracuse, ss:

On this 14th day of December, 1904, before me personally came Clarence W. Darling, to me known and who being by me duly sworn did depose and say: that he resides in the City of Syracuse, New York; that he is the Third Vice-President of the Bankers Surety Company; the corporation described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed to said instrument by order of the Board of Directors of said corporation and that he signed his name thereto by like order.

CLARENCE W. DARLING.

Subscribed and sworn to before me this 14th day of December, 1904.

L. HAIGHT,
Notary Public.

STATE OF NEW YORK,
County of Onondaga, City of Syracuse, ss:

On this 14th day of December, 1904, before me personally came Willis H. Michel, to me known and who being by me duly sworn did depose and say: that he resides in the City of Syracuse, New York; that he is the Assistant Secretary of the Bankers Surety Company; the corporation described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed

to said instrument by order of the Board of Directors of said
173 corporation, and that he signed his name thereto by like order.

WILLIS H. MITCHEL.

Subscribed and sworn to before me this 14th day of December, 1904.

L. H. HAIGHT,
Notary Public.

Extract from the minutes of the meeting of the Board of Directors of the Bankers Surety Company, held at the Company's office in the City of Cleveland, Ohio, on Tuesday, March 31st, 1903, at 1.30 p. m.

"There being a quorum of the Directors present, Mr. Olmsted "was elected Chairman of the meeting.

"The following preamble and resolution was duly moved and "seconded and unanimously adopted:

"Whereas, The Bankers Surety Company, in order to facilitate "its business of becoming surety on bonds, is required to execute "bonds in places other than the Home Office, upon application being "made for same; and

"Whereas, this Board is authorized by the By-Laws of this Com- "pany to appoint Third Vice-Presidents and Assistant Secretaries "as in their judgment the interests of the Company require;

"Therefore, Be it resolved, that this Board do proceed to elect "two Third Vice Presidents and one Assistant Secretary for the "State of New York, to hold their respective offices during the "pleasure of the Board, with only the following powers, to-wit:

"That either of said Third Vice-Presidents may, jointly with said "Assistant Secretary in the State of New York, subject to the ex- "ception, that no one person shall, in executing any bond, obligation
"or undertaking, act both as Third Vice President and as
174 "Assistant Secretary, sign, seal, acknowledge and deliver
"for and on behalf of said The Bankers Surety Company in "the State of New York, subject to the following condition:

"A. Any and all bonds, obligations and undertakings required "in judicial proceedings in any and all courts sitting or held in the "State of New York, including U. S. Circuit and District Courts, "also all bonds, obligations and undertakings required in any and "all proceedings in any Probate, Orphan's or Surrogate's Courts "sitting or held in the aforesaid State, and including also the exe- "cution of bonds of indemnity to sheriff or sheriffs in the aforesaid "State.

"B. Any and all bonds required by the United States Govern- "ment to be filed with the Internal Revenue Bureau of the Treas- "ury Department for the proper conduct of any tobacco or spirit "manufacturing business, including warehousing bonds, transporta- "tion bonds, transportation for warehousing bonds, export bonds, "distillers' annual bonds, tobacco and cigar manufacturers' bonds, "and any and all other bonds which may be required either by the

"Revenue Statutes or the Internal Revenue Bureau of the Treasury "Department of the United States, covering also the execution of "such consents as may be necessary in connection therewith;

"C. Any and all bonds guaranteeing the faithful performance of "contracts for the construction of any work or improvement, either "public or private which may be required by the statutes of any "State, rules or ordinances of any board, commission or public cor-
"poration, or private contracts, not including however, bonds
175 "which guarantee the payment of rentals or leaseholds, char-
"ter parties or instruments of like nature;

"D. Any and all bonds required to be filed by public officers "elected in said State (except treasurers and officers collecting taxes) "in qualifying for office; the said bonds being conditioned for the "faithful discharge of their duties and accounting for and paying "over the funds coming into their hands as such officers or in "such terms as by statute required;

"E. Any and all bonds required by the State of New York or "any City, Town or County in said State to be given or filed in "any City, Town or County of said State under the provisions "of the liquor tax law of the State of New York (Laws of 1896, "Chapter 112, as amended by the laws of 1897, Chapter 312) and "the various acts amendatory thereof and supplementary thereto.

"Condition.—All such bonds, obligations and undertakings shall "be executed in the name of the said The Bankers Surety Company "by either of said Third Vice Presidents jointly with said Assistant "Secretary as herein before provided and the seal of said Com-"pany shall be thereto attached; and

"Any and all such bonds, obligations and undertakings so exe-"cuted shall be binding upon said The Bankers Surety Company "to all intents and purposes as fully as if done by the President and "Secretary of the Company in their own proper persons in its "behalf.

"The Chair then announced that nominations for the two Third "Vice Presidents and one Assistant Secretary for the State of New "York, pursuant to the foregoing resolution, were in order; where-
"upon Leonard T. Haight and Clarence W. Darling were
176 "duly nominated for such Third Vice Presidents and Wil-
"liam H. Michel was nominated for such Assistant Secretary. "There being no further nominations, on motion duly seconded "and carried, the Secretary was authorized to cast the ballot on "behalf of the Directors present and the aforementioned nominees "were declared to have been unanimously elected to their respective "offices."

* * * * * * *

We, D. A. Macbeth, 2nd Vice President and Howard H. Burgess, Secretary of The Bankers Surety Company aforesaid, severally certify that we have compared the foregoing extract of the minutes of the meeting of the Board of Directors of said Company held on the 31st day of March, 1903, with the original thereof as recorded in the minute book of said Board of Directors of said Company, and that the same is a true and correct extract therefrom and includes all the proceedings of said meeting in reference to the officers therein referred to.

In Testimony Whereof, we the said D. A. Macbeth and said Howard H. Burgess hereunto subscribe our names as such 2nd Vice President and Secretary respectively, and have hereto affixed the seal of said Company this 28th day of January, A. D. 1904.

D. A. MACBETH,
[SEAL.] *2nd Vice President.*
HOWARD H. BURGESS, *Secretary.*

177 *The Bankers Surety Company of Cleveland, Ohio, Showing Financial Condition March* 31, 1904.

Assets.

Par value.		Market value.
$95,000 00	United States Coupon Bonds, 3 per cent...	$102,600 00
40,000 00	United States Register Bonds, 3 per cent..	43,200 00
25,000 00	City of Dayton, Ohio, School Bonds, 4 per cent.....	27,046 51
25,000 00	City of Cleveland, Ohio, Sewer Bonds, 4 per cent.	27,935 62
39,000 00	Lakewood, Ohio, Sewer Bonds, 4 per cent..	40,515 52
8,500 00	Glenville, Ohio, Sewer Bonds, 5 per cent..	8,948 64
20,000 00	Belmont County, Ohio, Sewer Bonds, 4 per cent.	21,436 21
3,000 00	Franklin County, Ohio, Bonds, 4 per cent.	3,149 88
19,000 00	City of Cambridge, Ohio, Bonds, 4 per cent.	20,796 57
14,000 00	Guernsey County, Ohio, Bonds, 4 per cent.	14,890 69
2,300 00	Coal & Iron National Bank, (Cleveland, Ohio), Stock.....	2,500 00
2,500 00	First National Bank, (Cleveland, Ohio), Stock	3,875 00
178		
5,000 00	Market National Bank, (Cleveland, Ohio), Stock.....	5,565 00
30,000 00	Steel Steamship Gold Bonds, 5 per cent..	30,000 00
5,000 00	Howell Davis Brant Co. Bonds.....	5,000 00
	Interest accrued	7,116 25
	Bills Receivable	5,141 64
	Furniture and Fixtures.....	3,137 75
	Outstanding Premiums less Commissions	24,852 24
	Cash in Office and Banks	44,407 64
	Collateral Loans	104,136 86
	Mortgage Loans	141,425 00
		$687,677 02

Liabilities.

Capital Stock.....		$500,000 00
Reserve for Unadjusted Claims		9,098 03
Re-insurance:		
Reserve.....	$75,547 98	
Surplus.....	103,031 01	
		178,578 99

We, D. A. Macbeth, 2nd Vice President and Wm. G. Rippey, Assistant Secretary respectively of the Bankers Surety Company, do hereby certify that the foregoing is a true statement of the assets and liabilities of the said Company on the date above stated. In testimony whereof, we hereunto set our hands and affix the
179 seal of the Company this 27th day of April, 1904.

D. A. MACBETH,
2nd Vice President.
WM. G. RIPLEY,
Assistant Secretary.

Sworn to and subscribed before me this 27th day of April, 1904.
FREDERICK H. JOHNSON,
[SEAL.] *Notary Public.*

(Endorsed:) Undertaking on appeal by Bankrupt, Jacob M. Mertens from Order to the Circuit Court of Appeals.—The within bond is approved as to form and sufficiency of sureties and is hereby allowed.—Geo. W. Ray, U. S. J.—Filed Dec. 16, 1904.

In the District Court of the United States for the Northern District of New York.

In the Matter of JACOB M. MERTENS, CHARLES R. MERTENS, ERNEST T. MERTENS, and EDMUND T. MERTENS, Individually and as Composing the Co-partnership Firm of "J. M. Mertens & Co," Bankrupts.

This Court having made its final order and decree in the
180 above entitled proceeding, which bore date September 6th, 1904, which confirmed the report of Hon. Charles L. Stone, Special Master herein, bearing date the 7th day of June, 1904, and which also, among other things, adjudged that the title to certain policies of life insurance in issue herein, and all the rights, powers and property represented thereby had passed to Albert K. Hiscock, as trustee in Bankruptcy of the above named Jacob M. Mertens, Bankrupt, and the said Jacob M. Mertens feeling aggrieved by the said order and decree and desiring to appeal therefrom, now says that in the record and proceedings of the Court in said proceeding there is manifest error, and for error, the Complainant assigns the following:

1. The Court erred in granting the relief prayed for in said petition filed herein.

2. The Court erred in refusing to dismiss the said petition.

3. The Court erred in confirming the order of the said Special Master and overruling the exceptions filed by the said Jacob M. Mertens, Bankrupt, to the report of said Special Master.

4. The Court erred in overruling the first exception filed by the said Jacob M. Mertens, Bankrupt, to the report of said Special Master, and in holding that the said report was in the form required

by law and in conformity with Rule 76 and that the Special Master had not exceeded his jurisdiction and power.

5. The Court erred in confirming the ruling of the Special Master and overruling the second exception filed by the Bankrupt, Jacob M. Mertens, to his report.

181 6. The Court erred in confirming the second conclusion of law contained in the report of said Referee and Special Master, and specifically in sustaining his conclusion that all the remaining right, title and interest of Jacob M. Mertens, Bankrupt, in and to each and all of the policies therein mentioned, and to all rights, powers and property represented thereby, had passed to Albert K. Hiscock, Trustee of his estate in said bankruptcy proceeding, and that they remained in him subject only to the just and lawful claims of the holders of said policies respectively, as security for the loans and advances made upon the security thereof, and in overruling the exception of the said Jacob M. Mertens, Bankrupt, thereto.

7. The Court erred in confirming the second conclusion of law contained in the report of said Special Master, and particularly the portion thereof wherein said Special Master reports that the said Jacob M. Mertens should upon demand execute any and all assignments, releases and other papers necessary to constitute proper vouchers in protection of said life assurance society in treating with said trustee as the owner of said policies respectively, and in overruling the exception of the said Jacob M. Mertens, Bankrupt, to that portion of the said report of the said Special Master, being the fourth exception filed by the said Jacob M. Mertens.

8. That the Court erred in its order and decree in ordering and adjudging that the said policies of insurance and all the rights, title and interest of said Jacob M. Mertens in and to each of said policies and the rights, powers and property represented thereby had passed to and were the property of Albert K. Hiscock, as Trustee in Bankruptcy of the estate of the said Jacob M. Mertens.

182 9. That the Court erred in its order and decree in ordering and adjudging that the said Jacob M. Mertens upon demand execute and deliver any and all assignments, releases and other papers necessary to constitute proper vouchers in protection of said life assurance society in treating the said trustee as the owner of said policies respectively and to execute and deliver upon demand to said trustee all assignments and releases which might be required by the said trustee or said life assurance society or which might be advisable in order to permit of the sale of said policies by the said Trustee or the exercise of the options provided in said policies by the said trustee, or the collection of any moneys due or to become due from said life assurance society upon said policies or either of them.

10. That the Court erred in refusing to hold that the policies involved in this proceeding had a cash surrender value.

11. That the Court erred in refusing to permit said Jacob M. Mertens to pay such cash surrender value to the trustee, and upon such payment, to continue to hold, own and carry said policies, free from the claims of creditors participating in the distribution of his estate under the bankruptcy proceedings.

12. That the Court, having refused to hold that the said policies had a cash surrender value, erred in failing to adjudge that the said policies were the property of the Bankrupt, Jacob M. Mertens, subject only to such incumbrances as had been placed thereon prior to the bankruptcy proceeding.

183 13. That the Court erred in refusing to hold that Albert K. Hiscock, as trustee of the Bankrupt's estate, had no interest in said policies.

Wherefore, said Jacob M. Mertens, Bankrupt, prays that said order and decree be reversed and that said Court be directed to enter a decree in accordance with the prayer of said Jacob M. Mertens or for such relief as he is entitled to in law and equity.

WILSON, COBB & RYAN,
Solicitors for Jacob M. Mertens, Bankrupt.

Office and Post Office address, No. 15 Third National Bank Bldg., Syracuse, New York.

(Endorsed)—Assignment of Errors.—Filed Dec. 16, 1904.—W. S. Doolittle, Clerk.

We the undersigned do hereby admit due, timely and sufficient personal service upon us of the citation annexed this 17th day of December, 1904.

A. K. HISCOCK,
Trustee in Bankruptcy of the Estate of Jacob M. Mertens, Charles R. Mertens, Ernest T. Mertens, and Edmund A. Mertens, Individually and as Composing the Co-partnership Firm of J. M. Mertens & Co., Bankrupts.
CEYLON H. LEWIS AND
WILL B. CROWLEY,
Solicitors for Said Albert K. Hiscock as Such Trustee as Aforesaid.

184 UNITED STATES OF AMERICA:

The President of the United States to Albert K. Hiscock, Trustee in Bankruptcy of the estate of Jacob M. Mertens, Charles R. Mertens, Ernest T. Mertens, and Edmund A. Mertens, individually and as composing the co-partnership firm of "J. M. Mertens & Co.," Bankrupts:

Whereas, Jacob M. Mertens, Bankrupt, has recently appealed to the United States Circuit Court of Appeals for the Second Circuit from the final order and decree rendered by the United States District Court in and for the Northern District of New York, on the 6th day of September, 1904, and filed and entered in the office of the Clerk of said Court on the 8th day of September, 1904, in a certain proceeding where- said Jacob M. Mertens, Bankrupt, is the respondent-appellant, and you are the petitioner-appellee, and the security required by law having been filed.

You are required, cited and admonished, to be and appear at a United States Circuit Court of Appeals for the Second Circuit, to be holden at the City of New York, in the State of New York, on the 14th day of January, 1905, to show cause, if any there be, why the said final order and decree mentioned in the order allowing said appeal, should not be corrected and why speedy justice should not be done in the premises.

Witness, Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America, this 16th day of December, in the year of our Lord, one thousand nine hundred and four,
185 and of the Independence of the United States, the one hundred and twenty-eighth.

GEO. W. RAY,
United States District Judge.

(Endorsed:) In Bankruptcy, No. 1527.—United States District Court.—In the Matter of Jacob M. Mertens, *et al.*, Bankrupts.—Citation.—Original.—Wilson, Cobb & Ryan, Attorneys for Bankrupts, Office and P. O. address, No. 15 Third Nat'l Bank Bldg., Syracuse, N. Y.—Original.—U. S. District Court, N. D. of N. Y.—Filed Dec. 23, 1904.—W. S. Doolittle, Clerk.

Stipulation as to Record

In the United States District Court for the Northern District of New York.

In the Matter of JACOB M. MERTENS, CHARLES R. MERTENS, ERNEST T. MERTENS, and EDMUND A. MERTENS, Individually and as Composing the Co-partnership Firm of "J. M. Mertens & Co.," Bankrupts.

It is hereby stipulated and agreed that the certified tran-
186 script of record herein to be sent to the Clerk of the United States Circuit Court of Appeals, in and for the Second Circuit, shall consist of the following records and papers:

1. The petition of the trustee and notice of motion to compel the assignment of policies.
2. The answer to the petition.
3. The order referring the controversy to a Special Master to take evidence and report.
4. The testimony taken before the Special Master.
5. The exhibits introduced in evidence in accordance with a stipulation now on file.
6. The findings, opinion and report of the Special Master.
7. The exceptions to the report.
8. The opinion of Judge Ray confirming the report of Special Master.
9. The order of the United States District Court directing the transfer of insurance policies.

10. The petition to the Circuit Court of Appeals for the Second Circuit for a revision and stipulations and papers on file pertaining thereto.

11. The notice of appeal to the Circuit Court of Appeals for the Second Circuit; assignment of errors; petition and allowance
187 of appeal; undertaking; citation; stipulations and papers pertaining to said appeal.

Dated December 17, 1904.

LEWIS & CROWLEY,
Solicitors for Respondent.
WILSON, COBB & RYAN,
Solicitors for Appellant.

(Endorsed:) Stipulation as to Record.—Filed Dec. 23, 1904.—W. S. Doolittle Clerk.

UNITED STATES OF AMERICA, *Northern District of New York, ss:*

I, William S. Doolittle, Clerk of the District Court of the United States of America, for the Northern District of New York, in the Second Circuit, do hereby certify that the foregoing pages, numbered from 1 to 199 inclusive, contain a true and complete transcript of the record and proceedings had in said court, in the matter of Jacob M. Mertens, Charles R. Mertens, Ernest T. Mertens and Edmund A. Mertens, individually and as composing the co-partnership firm of "J. M. Mertens & Co.," Bankrupts, as the same remain of record and on file in said office and have been stipulated by and between the solicitors for the respective parties.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of Utica, in the Northern District of New York, in the Second Circuit, this twenty-eighth day of December, in the year of our Lord, one thousand nine hundred and four, and of the Independence of the United States, the one hundred and twenty-ninth.

W. S. DOOLITTLE, *Clerk.*

188 United States Circuit Court of Appeals for the Second Circuit.

Nos. 14 and 30.—October Term, 1905.

Argued October 25, 1905; Decided November 28, 1905.

In the Matter of JACOB M. MERTENS ET AL., Bankrupts.

JACOB M. MERTENS, Petitioner and Appellant,

Appeal from the District Court of the United States for the Northern District of New York.

Before Judges Lacombe, Townsend, and Coxe.

This cause comes here and upon petition to review an order of the District Court, Northern District of New York, confirming a

report of a Special Master, overruling exceptions to the same and adjudging that certain policies of insurance upon the life of Jacob M. Mertens (one of the members of the bankrupt firm of "J. M. Mertens & Co.") and all the rights, title and interest of said Mertens in and to said policies, and the rights, powers and property represented thereby have passed to and are the property of the trustee in bankruptcy and now are and remain in him. The order directed Mertens upon demand to execute and deliver all assignments, releases and other papers necessary to constitute proper vouchers in protection of the insurance company, etc.

Besides the petition to review under Sec. 24*b* of the Act, an appeal was taken, upon the theory that the controversy here presented is one "arising in bankruptcy proceedings," and within the provisions of Sec. 24*a*. The opinion of the District Judge is reported in F. R.

189 *Per Curiam.*—In conformity with the views expressed by the Supreme Court in First Nat. Bank *v.* Chicago Title & Trust Co. (198 U. S., 288) the appeal must be dismissed, since the order sought to be reviewed was a mere step in bankruptcy proceedings proper and no controversy arising out of the settlement of the bankrupt's estate of the sort presented in Hewit *v.* Berlin Machine Works (194 U. S., 296) was disposed of by the action of the Court below. The jurisdiction of this Court is confined, in cases like the present, to revision in matter of law on due notice and petition under Sec. 24*b*.

Section 70 of the Bankruptcy Act provides as follows:—

"(*a*) The trustee of the estate of a bankrupt upon his appointment and qualification, and his successor or successors, if he should have one or more, upon his or their appointment and qualification, shall in turn be vested by operation of law with the title of the bankrupt as of the date he was adjudged a bankrupt, excepting so far as it is to property exempt, to all, * * * (3) Powers which he might have exercised for his own benefit, * * * , (5) Property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him * * *: Provided, that when any bankrupt shall have an insurance policy which has a cash surrender value, payable to himself, his estate or personal representatives, he may within thirty days after the cash surrender value has been ascertained and stated to the trustee by the Company issuing the same, pay or secure to the trustee the sum so ascertained and stated, and continue to hold, own and carry said policy, free from the claims of the creditors participating in the distribution of his estate under the bankruptcy proceedings, otherwise the policy shall pass to the trustee as assets."

At the time Mertens was adjudged a bankrupt he held three tontine policies in the Equitable Life Assurance Society.

190 By each his life was insured for a certain sum, payable to the insured, his executors, administrators and assigns within sixty days after proof of death, and each policy provided that at the expiration of twenty years from its date the insured, if living,

shall have the choice of exercising one of several options; and in each case one of these options is the cancellation of the policy in consideration of a sum of money, which includes not only a fixed sum, but also a part of the earnings of the policy, which earnings are not ascertainable until the end of the tontine period.

The policies did not give him the right to a cash surrender value at his option, in advance of the expiration of the tontine period; but did provide that within six months after the policy shall be in default for non payment of a premium, upon application accompanied by the surrender of the policy, another and a paid-up policy shall be issued upon the purchase power of the amount of the reserve alone, accumulated at the time of the default, against the strictly insurance feature of the policy. Evidence was given before the special master, who reports that it appears therefrom that upon the surrender of such tontine policy it has been the practice of the insurance company to pay upon the request of the assured a sum in each case equal to the then cash value of the paid-up policy.

The interest of the insured in the policies would pass under the provisions of Section 70*a*. for it is property which prior to the filing of the petition he could have transferred; indeed he had already transferred each of them as collateral to loans which he had obtained from a bank.

The only question is whether the policies are within the proviso, so that the bankrupt may upon paying or securing to the trustee the cash surrender value continue to hold, own and carry such policy free from the claims of his creditors.

It will not be necessary to review the numerous and somewhat conflicting decisions which are marshalled on the briefs. The Circuit Court of Appeals for the Seventh Circuit had the
191 same question before it on policies identical in their provision and on evidence showing that there was an actual specific sum of money which the insurer was willing to pay in cash for a surrender. That Court held:

"This policy does not fall within the proviso. The term 'cash surrender value,' therein employed, has a definite and legal meaning, namely, the cash value—ascertainable by known rules—of a contract of insurance abandoned and given up for cancellation to the insurer by the owner, *having contract right to do so.* The proviso does not include those policies where the right to surrender is not given by contract. In the present case, failing provision in the policy to that end, surrender could only be accomplished through agreement with the company." *In re* Welling (113 F. R., 189).

We should be inclined to concur with these views and to sustain the conclusion of the District Judge in the cause at bar that "no policy is understood to have a cash surrender value unless provided for in the policy so as to be enforceable by the insured"—were it not for a subsequent expression of opinion by the Supreme Court. This is found in Holden *v.* Stratton (198 U. S., 214) as follows:

"There has been some contrariety of opinion expressed by the Lower Federal Courts as to the exact meaning of the words 'cash surrender value' as employed in the proviso, some courts holding

that it means a surrender value expressly stipulated by the contract of insurance to be paid, and other courts holding that the words embrace policies, even though a stipulation in respect to surrender value is not contained therein, where the policy possesses a cash value which would be recognized and paid by the insurer on the surrender of the policy. It is to be observed that this latter construction harmonizes with the practice under the bankrupt act of 1867, *In re* Newlands (6 Ben., 342); *In re* McKinney (15 Fed Rep.,
192 535), and tends to elucidate and carry out the purpose contemplated by the proviso as we have construed it. However, whatever influence that construction may have, as the question is not necessarily here involved, we do not expressly decide it."

Although this is manifestly obiter to the questions decided in Holden *v.* Stratton, it is such an explicit declaration of the views of the Court upon the question raised here that we should hesitate to disragard it, and therefore have concluded to reverse the order under review and remand the cause with instructions to give the bankrupt an opportunity to pay and secure the actual value which would be paid on surrender according to the uniform practice of the company. By such a disposition of the cause the decisions in the two circuits will not be uniform and, although there is no appeal, our action upon petition to review may be reviewed on certiorari.

Order reversed and cause remanded with instructions, as above.

D. R. Cobb, for the Petitioner.

W. B. Crowley, for the Respondent.

193 At a stated term of the United States Circuit Court of Appeals for the Second Circuit, held at the United States Court House in the Court House Building, in the City of New York in the Southern District of New York, on the 9th day of December, 1905.

Present: Hon. E. Henry Lacombe, Judge; Hon. William K. Townsend, Judge; Hon. Alfred C. Coxe, Judge.

In the Matter of JACOB M. MERTENS, CHARLES R. MERTENS, ERNEST T. MERTENS, and EDMUND A. MERTENS, Individually and as Composing the Co-partnership Form of "J. M. Mertens & Co.," Bankrupts. JACOB M. MERTENS, Petitioner-Appellant.

This cause having come on to be heard on the 24th day of October, 1905, upon a petition to review an order and decree of the United States District Court for the Northern District of New York, granted on the 6th day of September, 1904, and filed and entered September 8, 1904, which confirmed the report of Hon. Charles L. Stone, Special Master, directing the petitioner to assign certain policies of insurance upon his life to the trustee in bankruptcy of his estate. Also upon an appeal from the aforesaid order and decree and said appeal having been dismissed for want of jurisdiction on the part of the Court to hear the same, Now, Therefore, on motion of Dorr Raymond Cobb, Solicitor and Counsel for the said petitioner, Jacob M. Mertens, it is

Ordered, adjudged and decreed and the Court doth hereby order adjudge and decree as follows:—

1. That the prayer of the said petitioner, Jacob M. Mertens be granted and that said order and decree of the District Court of the United States for the Northern District of New York be and
194 the same hereby is in all things reversed, with costs in this Court to said petitioner, Jacob M. Mertens.

2. That the Clerk of the Court be and he hereby is directed to issue to the said District Court of the United States for the Northern District of New York *and* mandate of this Court, remanding this cause to that Court, with instructions to give the said petitioner, Jacob M. Mertens, an opportunity to pay and secure to the trustee in bankruptcy of his estate the actual value which would have been paid by said insurer according to its uniform practice upon the surrender of the said policies of life insurance.

E. H. L.
W. K. T.
A. C. C.

O. K.
LEWIS & CROWLEY,
Attorneys for Appellee.

O. K.
D. RAYMOND COBB,
Att'y for Petitioner-Appellant.

Endorsed: U. S. Circuit Court of Appeals, Second Circuit. In the Matter of Jacob M. Mertens *et al.*, Bankrupts. Decree. Wilson, Cobb & Ryan, attorneys for petitioner. Office and P. O. Address No. 15 Third Nat'l Bank Bldg., Syracuse, N. Y. United States Circuit Court of Appeals, Second Circuit. Filed Dec. 11, 1905. William Parkin, Clerk.

195 UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby Certify that the foregoing pages, numbered from 1 to 194 inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of *In re* Jacob M. Mertens *et al.*, Bankrupts, Petitioners, as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 14th day of December in the year of our Lord One Thousand Nine Hundred and five and of the Independence of the said United States the One Hundred and thirtieth.

[Seal United States Circuit Court of Appeals.]

WM. PARKIN, *Clerk.*

196 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Second Circuit, Greeting:

[Seal of the Supreme Court of the United States.]

Being informed that there is now pending before you a suit in which Jacob M. Mertens is appellant and petitioner, and Albert K. Hiscock, Trustee in bankruptcy of the estate of Jacob M. Mertens, Charles R. Mertens, Ernest T. Mertens, and Edmund A. Mertens, individually and as composing the copartnership firm of J. M. Mertens & Co., bankrupts, is appellee and respondent, which suit was removed into said Circuit Court of Appeals by virtue of an appeal from the District Court of the United States for the Northern District of New York, and wherein there was also filed in said Circuit Court of Appeals a petition for review by said Jacob M. Mertens, and, we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the United States,

197 Do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the sixth day of March, in the year of our Lord one thousand nine hundred — six.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

198 [Endorsed:] File No. 20,104. Supreme Court of the United States. No. 602, October Term, 1905. Albert K. Hiscock, Trustee &c., *vs.* Jacob M. Mertens. Writ of Certiorari. United States Circuit Court of Appeals, Second Circuit. Filed Mar. 10, 1906. William Parkin, Clerk.

199 In the Supreme Court of the United States.

ALBERT K. HISCOCK, Trustee in Bankruptcy of Jacob M. Mertens, Charles R. Mertens, Ernest T. Mertens, and Edmund A. Mertens, Individually and as Composing the Co-partnership Firm of "J. M. Mertens & Co.," Bankrupts, Petitioner,

vs.

JACOB M. MERTENS, Respondent.

It is hereby stipulated, agreed and consented that the transcript of record and proceedings in this cause in the United States Circuit Court of Appeals for the Second Circuit, which was certified by the Clerk of said Circuit Court of Appeals on the 14th day of December, 1905, and which is now on file with the Clerk of said Supreme Court

of the United States, having been so filed for use upon the application for a writ of certiorari herein, may be taken, used and considered as a full and complete return by said United States Circuit Court of Appeals for the Second Circuit to the writ of certiorari issued by said Supreme Court to said Circuit Court of Appeals herein and dated March 6, 1906.

Dated, March 9, 1906.

WILL B. CROWLEY,
Counsel for Albert K. Hiscock, Trustee, Petitioner.
DON RAYMONND COBB,
Counsel for Jacob M. Mertens, Respondent.

200 Endorsed: Supreme Court of the United States. Albert K. Hiscock, as Trustee, &c., Petitioner, *vs.* Jacob M. Mertens, Respondent. Stipulation as to return to writ of certiorari. Will B. Crowley, Attorney for Petitioner. Office and post office address, 20 White Memorial Building, Syracuse, N. Y. United States Circuit Court of Appeals, Second Circuit. Filed Mar. 10, 1906. William Parkin, Clerk.

201 To the Honorable the Supreme Court of the United States, Greeting:

The record and all proceedings whereof mention is within made having been lately certified and filed in the office of the Clerk of the said Suprme Court of the United States, a copy of the stipulation of counsel is hereto annexed and by direction of counsel for the petitioner, said stipulation is hereby certified as the return to the writ of certiorari issued herein.

Dated New York, March 10th, 1906.

[Seal United States Circuit Court of Appeals.]

WM. PARKIN
Clerk of the United States Circuit Court of Appeals for the Second Circuit.

202 [Endorsed:] United States Circuit Court of Appeals, Second Circuit. Matter of Jacob M. Mertens *et al.* Return to Certiorari. Office of the Clerk Supreme Court U. S. Received Mar- 19 1906.

203 [Endorsed:] File No. 20,104. Supreme Court U. S. October Term, 1905. Term No. 602. Albert K. Hiscock, Trustee &c., Petitioner, *vs.* Jacob M. Mertens. Writ of Certiorari and return. Filed Mar. 19", 1906.